90-780

Case No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1990

EDWARD DeSANTIS and RISK DETERRENCE, INC.
Petitioners

v.

WACKENHUT CORPORATION
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

PETITION FOR WRIT OF CERTIORARI

Jon Mercer
3115 West Loop South,
Suite 22
Houston, Texas 77027
Tele: (713) 626-9594

Counsel of Record

Of Counsel:
Theodore C. Flick
1003 Wirt Road, Suite 202
Houston, Texas 77055
Tele: (713) 932-8300

Questions Presented

Section 1 of the Sherman Antitrust Act declares every contract in restraint of trade to be illegal. In this case, the Texas Court found a former employee's noncompetition contract to be an *unreasonable* restraint of trade because it was not necessary to protect any legitimate business interest of the former employer. Though the former employee had been enjoined from competing, the Texas Court denied an Antitrust recovery because there was no proof of an adverse effect on competition in the relevant market (beyond the proof of the business lost when the Injunction issued). Under these circumstances, this case presents the following questions:

1.

Can a former employee's noncompetition contract which is an unreasonable restraint of trade under the common law be a violation of the Sherman Antitrust Act?

2.

If the unreasonable contract is Injunctively enforced, and the former employee is prevented from competing with the former employer, is this a *per se* violation of the Sherman Act?

3.

If the Antitrust analysis is under the Rule of Reason, does the Sherman Act require that the former employee demonstrate a relevant market analysis in addition to the actual detrimental effect of the loss of business contracts resulting from the removal of the former employee from the competitive market?

List Of Parties

The parties to the proceeding below were:

The Petitioners were Edward DeSantis and Risk Deterrence, Inc., a Texas corporation which has no parent companies or subsidiaries.

The Respondent was Wackenhut Corporation.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

Petitioners Edward DeSantis and Risk Deterrence, Inc. respectfully pray that a Writ of Certiorari issue to review the June 6, 1990 judgment and opinion of the Supreme Court of Texas.

Opinions Below

The opinion of the Supreme Court of Texas is reported at 793 S.W.2d 670, and is reprinted in the Appendix (p. A-1). The opinion and judgment replaced a July 13, 1988 opinion and judgment of the Supreme Court of Texas which sustained the Antitrust cause of action without reference to the Sherman Antitrust Act. The opinion of the intermediate Texas Court of Appeals is reported at 732 S.W.2d 29.

Jurisdiction

On June 6, 1990 the opinion and the judgment of the Supreme Court of Texas were delivered (Appendix, pp. A-30; A-39). The Sherman Antitrust Act questions were first raised in the June 6, 1990 opinion. Extension of time was granted for the filing of Petitioners' Motion For Rehearing (p. A-40); and the Motion was timely filed (p. A-42). Petitioners' Point of Error on Motion For Rehearing to the Supreme Court of Texas preserved Petitioners' complaints (p. A-43).

On September 12, 1990 the Petitioners' Motion For Rehearing was overruled by the Supreme Court of Texas (p. A-44). This Petition For Writ of Certiorari is being filed with this Court within 90 days of the overruling of Petitioners' Motion For Rehearing.

The jurisdiction of this Court to review the judgment of the Supreme Court of Texas is invoked under *28 U.S.C. Sec. 1257 (a)*. The Supreme Court of Texas is the highest Texas Court in civil litigation. Its denial of the Antitrust remedy in this case is based solely on the Sherman Antitrust Act, a statute of the United States.

Statutes Involved

15 U.S.C. Sec. 1 (the Sherman Antitrust Act, Section 1):

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal. ..."

Sec. 15.05, Tex. Bus. & Com. Code Ann. (the Texas Free Enterprise And Antitrust Act of 1983):

> "(a) Every contract, combination, or conspiracy in restraint of trade or commerce is unlawful."

Statement Of The Case

In 1984, Wackenhut Corporation, the third largest security service company in the industry, did $240 million in business. It had 90 offices in the United States and its activities were international in scope. Everyone in the company, including senior executives, signed a noncompetition contract. This had been the corporation's policy from the start.

As an employee of Wackenhut Corporation, Ed DeSantis had signed one of the noncompetition contracts. It barred all post-employment competition with Wackenhut in a 40 county area surrounding Houston for 2 years. DeSantis' employment was terminated in early 1984. After the termination, DeSantis formed Risk Deterrence, Inc. ("RDI") to provide security consulting services and, on a limited basis, security guard services.

During the several months after DeSantis' termination, two of Wackenhut's customers - Marathon Oil Company and TRW Mission Drilling Products - became dissatisfied with Wackenhut's services (Appendix, p. A-19). At Marathon, for example, Wackenhut's own Inspector found that "2nd and 3rd string type people" were being assigned as security guards at the Marathon facility. TRW experienced similar deterioration in Wackenhut's services at the TRW facility.

In late 1984, Marathon made a Security Consulting contract with RDI which provided for revenues of $18,000 per year; and a Security Guard contract providing for revenues of $327,000 per year. Both contracts were for 5 year terms but permitted cancellation on thirty day notice. TRW Mission Drilling Products was favorably considering RDI's proposal for a 3 year Security Guard contract providing $243,000 in annual revenues.

When Wackenhut learned of the Marathon/RDI contracts, it filed this suit and secured immediate, temporary, and (ultimately) permanent Injunctions which barred all activity by DeSantis which was competitive with the business of Wackenhut. Both of the Marathon contracts were immediately terminated. The TRW proposal had to be withdrawn. As a result of the Injunction enforcing the noncompetition contract, a revenue potential of $2,454,000 in the security service market was redirected.

At the Trial Court level, DeSantis and RDI contended that the noncompetition contract was an unreasonable and unenforceable restraint of trade which violated the Texas Free Enterprise And Antitrust Act. The Trial Court rejected this contention as did the intermediate Court of Appeals.

On appeal to the Supreme Court of Texas, the noncompetition contract was found to be an unreasonable and unenforceable restraint of trade (Appendix, p. A-20). That Court found that DeSantis had not used any business good-will of Wackenhut (p. A- 18); had not possessed or used any trade secret, confidential or proprietary information of Wackenhut (p. A-19); and that the noncompetition contract was not "...necessary to protect any legitimate business interest..." of Wackenhut (p. A-20). The Supreme Court of Texas ruled that the noncompetition contract was unreasonable and unenforceable (p. A-20).

Turning to the DeSantis/RDI Counterclaim under the Texas Free Enterprise And Antitrust Act of 1983, the Court noted the Texas Legislature's mandate that the Act "...shall be construed in harmony with federal judicial interpretations of comparable federal antitrust statutes to the extent consistent with this purpose" (p. A-25). The Court then referred to federal decisions under the Sherman Antitrust Act and concluded that under

Sherman Act analysis, the noncompetition contract was not a *per se* violation "...but must be analyzed under the rule of reason" (p. A-26). Holding that Common Law unreasonableness does not equate to a violation of the antitrust "rule of reason", the Court concluded that the rule of reason requires proof of "...an adverse effect on competition in the relevant market" (p. A-27) beyond the proof which was presented in this case. Based solely on this perception of Sherman Act requirements, the Supreme Court of Texas denied the damage claim for the antitrust violation arising out of the noncompetition contract at issue.

Stage At Which Federal Question Raised

The Federal Question involving the Sherman Antitrust Act was first raised in the June 6, 1990 Opinion (on Rehearing) of the Supreme Court of Texas. That Court's July 13, 1988 (original) opinion had sustained the Petitioners' Antitrust counterclaim under the Texas Free Enterprise And Antitrust Act without reference to the Federal Act. The intermediate Texas Court of Appeals opinion, likewise, did not address any Sherman Act issues.

In their Motion For Rehearing of the June 6, 1990 Opinion and Judgment, Petitioners preserved the complaints now presented to this Court (A-43).

Reasons Why This Writ Should Be Granted

Our society is witnessing an increase in employee desire for better working conditions and failing that, an increase in employee mobility in the marketplace. Most employers respond by providing improvements in the work-place. Some employers resort to contractual restraints which preclude employee mobility - often unreasonably. Such contractual restraints of trade "...present problems which have kept them before the courts for more than five hundred years," Blake, *Preventing Competition By A Former Employee*, 15 ABA, Section of Antitrust Law Proceedings 235, at 235-36 (1958) [expanded into *Employee Agreements Not To Compete*, 73 Harv. L. Rev. 625 (1960)].

Blake suggests that "(f)or every covenant that finds its way to court, there are thousands which exercise an *in terroram* effect both on employees who respect their contractual obligations and on competitors who fear legal complications if they employ a covenantor - or are anxious to maintain a gentlemanly relationship with their competitors.", Blake, at 271- 72. Employers can fashion "truly ominous covenants" with the confidence that the only sanction will be a paring down of the unreasonable portions; to which Blake concludes: "This smacks of having one's employee's cake, and eating it, too.", at 272.

This case presents important questions of federal law which have not been and should be directly decided by this Court. Do the Antitrust laws apply to an employee's *unreasonable* noncompetition contract? and, if so, What proof is required to invoke the remedies? The Supreme Court of Texas held that the employee's noncompetition contract in this case was *unreasonable* because it was not necessary to protect any legitimate business interest of the former employer. However, that Court held that this was not a *per se* violation of the Antitrust laws and that the Rule of Reason required proof of an adverse effect on

competition in the relevant market beyond the effect produced by the Injunction preventing competition in this case.

Petitioners' suggest that the lower Court's "*per se*" holding is contrary to principles established by this Court's decision in *National Society Of Professional Engineers v. United States,* 435 U.S. 679, 98 S.Ct. 1355, 55 L.Ed.2d 637 (1978); and that the lower Court's "Rule of Reason" holding is contrary to this Court's decisions in *National Collegiate Athletic Association v. Board Of Regents of the University Of Oklahoma*, 468 U.S. 85, 104 S.Ct. 2948, 82 L.Ed.2d 70 (1984) and *FTC v. Indiana Federation Of Dentists,* 476 U.S. 447, 106 S.Ct. 2009, 90 L.Ed.2d 445 (1986). The Error in this case is legally significant to the Petitioners.

Of greater import to this Court, the Issue in this case is socially and economically significant to the preservation of the competitive forces which fuel our economy ("For example, the social cost of preventing an employee from going to a job at which he would be more productive is theoretically equal, given an efficient market, with the economic loss to the individual", Blake, at 276); and to the countless employees in the American workforce who are subject to similar post-employment restraints. The Supreme Court of the United States should review this case and determine (1) whether a contract which *unreasonably* restrains post-employment competition is a *per se* violation of the Sherman Antitrust Act, and, if not, (2) whether the Rule of Reason requires proof of a relevant market analysis, in addition to proof of actual detrimental effect, to establish a violation of the Antitrust laws.

(a) The Sherman Antitrust Act (And The Common Law)

> "Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise.

> They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms. And the freedom guaranteed each and every business, no matter how small, is the freedom to compete - to assert with vigor, imagination, devotion, and ingenuity whatever economic muscle it can muster."

United States v. Topco Associates, Inc., 405 U.S. 596, 610; 92 S.Ct. 1126, 1135; 31 L.Ed.2d 515 (1972).

> "The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions. But even were that premise open to question, the policy unequivocally laid down by the Act is competition."

Northern Pacific Railway Company v. United States Of America, 356 U.S. 1, 4; 78 S.Ct. 514; 2 L.Ed.2d 545, 549 (1958).

The rule governing noncompetition contracts was set out over 90 years ago by Judge (later Chief Justice) Taft: To be valid, a covenant not to compete must be "ancillary to the main purpose of a lawful contract, and necessary to protect the covenantee in the enjoyment of the legitimate fruits of the contract, or to protect him from the dangers of an unjust use of its fruits by the other party." *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 282 (1898) *Aff'd as modified*, 175 U.S. 211, 20 S.Ct. 96, 44 L.Ed. 136

(1899). It follows that a noncompetition covenant which is not necessary to protect the covenantee *is not valid*.

Addyston retains its status as a classic Opinion in the field of Antitrust law. In *Addyston*, Judge Taft considered the defendants' contention that the restraint was valid at common law, hence did not violate the (recently enacted) Federal Antitrust Law. Judge Taft pointed out that:

> "... - it is certain that, if the contract of association which bound the defendants was void and unenforceable at the common law because in restraint of trade, it is within the inhibition of the statute if the trade it restrained was interstate", 85 F. at 278- 9.

The Supreme Court of Texas incorrectly concluded that "an agreement may be unreasonable as between the parties and yet not violate the rule of reason test under the antitrust laws" (Appendix, p. A-27). The DeSantis covenant is unreasonable between the parties because it fails the common law test. A restraint of trade that is unreasonable under the common law is in violation of the Antitrust law, *Addyston*.

Under both the common law and the Antitrust law, the focus is on whether there is any pro-competition justification for the restraint. A potential pro-competition justification is that, with the post-employment restraint, the employer will provide valuable training and share confidential information with the employee thereby enhancing productivity in the marketplace and benefiting the public interest. The employer is entitled to protection against subsequent misuse of its confidential information; and, upon a sufficient showing, a post-employment restraint is deemed reasonable. The post-employment restraint in this case is not supported by any such pro-competition justification. Without pro-competitive virtue, the restraint violates the federal Antitrust law.

(b) Antitrust Analysis of a Restraint of Trade

The initial Antitrust question is whether the DeSantis restraint is to be considered under a *per se* or Rule of Reason analysis. While DeSantis and RDI suggest that the contractual restraint in this case has no pro-competitive virtue and is a *per se* violation of the Antitrust laws, they emphatically urge that the same result prevails under a Rule of Reason analysis.

(i) *Per Se* or Rule Of Reason:

Historically, the facts under which the DeSantis noncompetition contract was enforced would have been pigeonholed as a *per se* violation of the antitrust law because the contract's "...nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish (its) illegality - (it is) 'illegal *per se*'", *National Society Of Professional Engineers v. United States*, 435 U.S. 679, 692; 98 S.Ct. 1355, 1365; 55 L.Ed.2d 637 (1978).

The DeSantis restraint would likewise be condemned under the Rule of Reason where the inquiry "...is whether the challenged agreement is one that promotes competition or one that suppresses competition. 'The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition'", *National Society of Professional Engineers*, 435 U.S. at 691; quoting *Chicago Board of Trade v. United States*, 246 U.S. 231, 38 S.Ct. 242, 62 L.Ed. 683 (1918).

The Supreme Court of Texas cites several cases (p. A-26) to support its proposition that covenants not to compete are not *per se* violations of the Sherman Act. Each of the cases is distinguishable on the controlling

issue: the DeSantis covenant is *unreasonable*. In each of the cited cases, the contractual restraint was *reasonable*.

In *United States v. Empire Gas Corp.*, 537 F.2d 296 (8th Cir. 1976), *cert. denied*, 429 U.S. 1122, 97 S.Ct. 1158, 51 L.Ed.2d 572 (1977) there was no showing or finding that the covenants were unreasonable. In *Bradford v. New York Times Company*, 501 F.2d 51 (2nd Cir. 1974) the Court expressly found that the agreement was reasonable (therefore declined to find a *per se* violation). In *Golden v. Kentile Floors, Inc.*, 512 F.2d 838 (5th Cir. 1975) the Court applied the common law test and found the covenant to be reasonable, hence not in violation of the Sherman Act. In *Frackowiak v. Farmers Ins. Co.*, 411 F.Supp. 1309 (D. Kan. 1976) the Court found no evidence that the non solicitation agreement was "... unreasonable as to scope, duration, or any other factor" (at 1319). In *Consultants & Designers v. Butler Service Group*, 720 F.2d 1553 (11th Cir. 1983) the Court, again, found the covenants to be reasonable under state law, hence not violative of the Antitrust Law. In *Aydin Corp. v. Loral Corp.*, 718 F.2d 897 (9th Cir. 1983) the "non interference agreement" expressly permitted the former employee to "...be employed by or engage in a competing business," (at 900), and the Court correctly declined to consider it as a *per se* violation of the Sherman Act.

In *Newburger, Loeb & Co., Inc. v. Gross*, 563 F.2d 1057 (2nd Cir. 1977), *cert. denied*, 434 U.S. 1035, 98 S.Ct. 769, 54 L.Ed.2d 782 (1978) the Court held that "Since Gross failed to prove the Partnership guilty of enforcing a restraint that was overbroad *per se* or otherwise unreasonable, he failed to make out a case under any possible interpretation of the Sherman Act" (at 1083). In reaching this result, the Court correctly framed the inquiry:

> "If Section 1 of the Sherman Act were to be applied, two lines of inquiry seem relevant. First,

there is the question of facial overbreadth: Will the restrictive covenant operate in circumstances where no valid business interest of the ex-employer is at stake? Restraints on post-employment competition that serve no legitimate purpose at the time they are adopted would be *per se* invalid. See generally *Northern Pacific Ry. Co. v. United States*, 356 U.S. 1, 5, 78 S.Ct. 514, 2 L.Ed.2d 545 (1958). Second, even if the clause is not overbroad *per se*, it might still be construed for unreasonableness: Are the restrictions so burdensome that their anticompetitive purposes and effects outweigh their justifications? Restraints that fail this balancing test might be struck down under a rule of reason." 563 F.2d at 1082.

The Supreme Court of Texas found the DeSantis restraint to be unreasonable because it was not necessary to protect any legitimate business interest of Wackenhut. Under the *Newburger* analysis, the DeSantis restraint is a *per se* violation of the federal antitrust laws.

"A covenant not to compete is basically a horizontal market division removed from its illegal-per-se category only because it is reasonably necessary to protect a valid principal transaction", Note, *Antitrust Significance of Covenants Not To Compete*, 64 Mich. L. Rev. 503, at 510 (1966). When, as in this case, the restraint is not reasonably necessary to protect a valid principal transaction, it should be condemned as a *per se* violation.

(ii) Rule of Reason Proof:

Under the Rule of Reason, market power in the relevant market is but one tool by which anticompetitive effect may be shown. It should not be an essential element necessary to establish a Sherman Act violation, especially where actual detrimental effect is shown. This is clear from recent decisions of this Court.

In the 1984 decision in *National Collegiate Athletic Association v. Board Of Regents of the University Of Oklahoma*, 468 U.S. 85, 104 S.Ct. 2948, 82 L.Ed.2d 70 (1984), this Court described the NCAA television broadcasting regulations as a naked restraint of trade but recognized that some restraints (such as rules limiting the size of teams and prohibiting payments to players) were essential if the college football product was to be available at all. This Court accordingly declined to apply a *per se* analysis and turned to the Rule of Reason. Evaluating the antitrust claims under the Rule of Reason, the Court confirmed that:

> "As a matter of law, the absence of proof of market power does not justify a naked restriction on price or output. To the contrary, when there is an agreement not to compete in terms of price or output, 'no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement' *** Thus the plan is inconsistent with the Sherman Act's command that price and supply be responsive to consumer preference. We have never required proof of market power in such a case. This naked restraint on price and output requires some competitive justification even in the absence of a detailed market analysis." 468 U.S. at 109-110.

In footnote 42 this Court approved the Amicus Curiae statement that "where the anticompetitive effects of conduct can be ascertained through means short of extensive market analysis, and where no countervailing competitive virtues are evident, a lengthy analysis of market power is not necessary.", 468 U.S. at 110.

In 1986 this Court amplified the Rule of Reason considerations in *FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 106 S.Ct. 2009, 90 L.Ed.2d 445 (1986). This

case involved a "group boycott" which had historically been accorded *per se* treatment under the antitrust laws. Withdrawing from a strict *per se* application, the Court reviewed the case under the Rule of Reason and held: "Absent some countervailing procompetitive virtue - such as, for example, the creation of efficiencies in the operation of a market or the provision of goods and services *** such an agreement limiting consumer choice by impeding the 'ordinary give and take of the market place' *** cannot be sustained under the Rule of Reason," 476 U.S. at 459.

Citing *NCAA*, the Court reiterated that " 'as a matter of law, the absence of proof of market power does not justify a naked restriction on price or output', and that such a restriction 'requires some competitive justification even in the absence of a detailed market analysis'", 476 U.S. at 460.

> "...The Commission's failure to engage in a detailed market analysis is not fatal to its finding of a violation of the Rule of Reason. *** Since the purpose of the inquiries into market definition and market power is to determine whether an arrangement has the potential for genuine adverse effects on competition, *'proof of actual detrimental effects, such as a reduction of output,' can obviate the need for an inquiry into market power*, which is but a 'surrogate for detrimental effects'", 476 U.S. at 460-461 (emphasis added).

(c) Error In This Case

The post-employment restraint in this case was not reasonably necessary to protect any legitimate interest of Wackenhut. Its sole nature and effect was plainly anticompetitive. It did not promote - it only suppressed - competition. This restraint fails either a *per se* or a Rule of Reason analysis. It violates the Sherman Act. This Court

should rule that the Supreme Court of Texas erred in concluding otherwise.

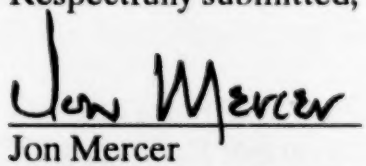
****

Lower Courts need guidance from this Court as to the applicability of the Antitrust Laws to post-employment noncompetition contracts; and, if applicable, the nature of proof required to invoke the remedies thereunder.

Conclusion

Because the contractual restraint in this case fails either a *per se* or a Rule of Reason analysis, this Petition For Certiorari should be granted. This Court should correct the Sherman Antitrust Act holdings of the Supreme Court of Texas and remand the case for further proceedings.

Respectfully submitted,



Jon Mercer
3115 West Loop South,
Suite 22
Houston, Texas 77027
Tele: (713) 626-9594

Counsel of Record

Of Counsel:
Theodore C. Flick
1003 Wirt Road, Suite 202
Houston, Texas 77055
Tele: (713) 932-8300

Appendix

The Supreme Court of Texas June 6, 1990 Opinion:

IN THE SUPREME COURT OF TEXAS

NO. C-6617

Edward DeSANTIS, et al.,
Petitioners,

FROM HARRIS COUNTY

v.

FOURTEENTH DISTRICT

WACKENHUT CORPORATION,
Respondent.

ON MOTION FOR REHEARING

On motions for rehearing, our opinion and judgment of July 13, 1988, are withdrawn, and the following is now the opinion of the Court.

This case involving a noncompetition agreement between an employer and employee presents three principal issues: first, whether the law of the state chosen by the parties to govern their agreement should be applied; second, whether the noncompetition agreement is enforceable; third, if the agreement is not enforceable, whether damages for its attempted enforcement are recoverable under the Texas Free Enterprise and Antitrust Act of 1983 or for wrongful injunction, fraud, or tortious interference with contract.

The trial court applied the law of the state of Florida, chosen by the parties to govern the noncompetition agreement, to hold the agreement valid but overly broad as to the geographical territory in which competition was restricted. Based upon a jury finding that the employee breached the agreement, the trial court enjoined any

further violation of the agreement within a smaller territory, and denied the employee's claims for damages. The court of appeals affirmed. 732 S.W.2d 29. We hold that Texas law, not Florida law, applies in this case, and that under Texas law, the noncompetition agreement is unenforceable. We further hold that the employee is not entitled to recover damages for his employer's wrongfully obtaining an injunction against him, and that the employee has failed to show fraud, tortious interference, or a violation of the Texas Free Enterprise and Antitrust Act entitling him to damages. We accordingly reverse the judgment of the court of appeals and render judgment in accordance with this opinion.

I

A

Edward DeSantis has been providing international and corporate security services, both in the CIA and the private sector for his entire career. In June 1981, while employed by R.J. Reynolds Industries in North Carolina, DeSantis interviewed for a position with Wackenhut Corporation. At that time, Wackenhut, which was chartered and headquartered in Florida, was the third largest company in the nation specializing in furnishing security guards for businesses throughout the country. DeSantis met with Wackenhut's president, founder, and majority stockholder, George Wackenhut, at the company's offices in Florida, and the two agreed that DeSantis would immediately assume the position of Wackenhut's Houston area manager. According to DeSantis, George Wackenhut promised him that the area manager's position was only temporary, and that he would soon be moved into a top executive position. George Wackenhut denies that he made any such promises to DeSantis, admitting only that he mentioned advancement to an executive position as a possible opportunity.

At Wackenhut's request, DeSantis signed a noncompetition agreement at the inception of his

employment. The agreement recites that it was "made and entered into" on August 13, 1981, in Florida, although DeSantis signed it in Texas. It also recites consideration "including but not limited to the Employee's employment by the Employer". In the agreement DeSantis covenanted that as long as he was employed by Wackenhut and for two years thereafter, he would not compete in any way with Wackenhut in a forty-county area in south Texas. DeSantis expressly acknowledged that Wackenhut's client list "is a valuable, special and unique asset of [Wackenhut's] business" and agreed never to disclose it to anyone. DeSantis also agreed never to divulge any confidential or proprietary information acquired through his employment with Wackenhut. Finally, DeSantis and Wackenhut agreed "that any questions concerning interpretation or enforcement of this contract shall be governed by Florida law."

DeSantis remained manager of Wackenhut's Houston office for nearly three years, until March 1984, when he resigned under threat of termination. DeSantis contends that he was forced to quit because of disagreements with Wackehut's senior management over the profitability of the Houston office. Wackenhut contends that DeSantis was asked to resign because of his unethical solicitation of business.

Following his resignation, DeSantis invested in a company which marketed security electronics. He also formed a new company, Risk Deterrence, Inc. ("RDI"), to provide security consulting services and security guards to a limited clientele. The month following termination of his employment with Wackenhut, DeSantis sent out letters announcing his new ventures to twenty or thirty businesses, about half of which were Wackenhut clients. He added a postscript to letters to Wackenhut clients in which he disclaimed any intent to interfere with their existing contracts with Wackenhut. Within six months, however, one of Wackenhut's clients, Marathon Oil

Company, had terminated its contract with Wackenhut and signed a five-year contract with RDI, and a second Wackenhut client, TRW-Mission Drilling Products, was considering doing the same. Wackenhut claims that DeSantis was acquiring its clients in violation of the noncompetition agreement. DeSantis claims that these clients began considering other security service providers only after the quality of Wackenhut's services declined, following DeSantis' departure.

B

Wackenhut sued DeSantis and RDI in October 1984 to enjoin them from violating the noncompetition agreement, and to recover damages for breach of the agreement and for tortious interference with business relations. Wackenhut alleged that DeSantis and RDI were soliciting its clients' business using confidential client and pricing information which DeSantis obtained through his employment with Wackenhut. The trial court issued an ex parte temporary restraining order against DeSantis and RDI, and fixed the amount of the requisite bond which Wackenhut filed at $5,000. Following a hearing, the trial court issued a temporary injunction upon a $75,000 bond, which Wackenhut also filed. DeSantis and RDI counterclaimed against Wackenhut, alleging that Wackenhut had fraudulently induced DeSantis to sign the noncompetition agreement, that the agreement violated state antitrust laws, and that enforcement of the agreement by temporary injunction was wrongful and tortiously interfered with DeSantis and RDI's contract and business relationships. RDI claimed damages for loss of the Marathon contract, which Marathon terminated after the injunction issued, for loss of the TRW business, and for injury to its reputation. DeSantis claimed damages for lost salary, impaired reputation, and mental anguish. DeSantis and RDI both sought statutory damages under the Texas Free Enterprise and Antitrust Act, Texas Business and Commerce Code Annotated sections 15.01-15.51 (Vernon 1987 and Supp.1990), and exemplary

damages.

The trial court granted Wackenhut's motion for summary judgment on DeSantis and RDI's claim for tortious interference, and directed a verdict against them on their fraud claim. At trial, Wackenhut withdrew its tortious interference claim. A jury found that DeSantis breached the noncompetition agreement by competing with Wackenhut, but failed to find that Wackenhut would be irreparably harmed if DeSantis were not prohibited from further breaching the agreement. [FN1] The jury also failed to find that Wackenhut had ever been unfair, unjust, misleading or deceptive to DeSantis so as to cause him any injury. The jury found that Wackenhut's enforcement of the noncompetition agreement had caused DeSantis no damages, but had caused RDI to lose profits from Marathon's and TRW's business in the amount of $9,000 in the past and a like amount in the future.

The trial court concluded that irreparable harm to Wackenhut was either presumed from DeSantis' breach of the agreement under Florida law, or established as a matter of law because of the absence of an adequate legal remedy for breach of the agreement under Texas law. Accordingly, the trial court permanently enjoined DeSantis from competing with Wackenhut, and RDI from employing DeSantis to compete with Wackenhut, for two years from the date DeSantis left Wackenhut in an area reduced by the trial court from the forty counties stated in the agreement to the thirteen counties found by the trial court to be reasonably necessary to protect Wackenhut's interest. The trial court also permanently enjoined DeSantis from divulging Wackenhut's client list or proprietary information, and RDI from using any proprietary information of Wackenhut's acquired through DeSantis. The trial court denied all relief requested by DeSantis and RDI, based upon the jury's finding that DeSantis had breached his agreement with Wackenhut.

The trial court awarded Wackenhut attorney's fees and costs.

The court of appeals affirmed the judgment of the trial court in all respects.

II

We first consider what law is to be applied in determining whether the noncompetition agreement in this case is enforceable. Wackenhut contends that Florida law applies, as expressly agreed by the parties. DeSantis argues that Texas law applies, despite the parties' agreement.

A

This Court has not previously addressed what effect should be given to contractual choice of law provisions. We begin with what Chief Justice Marshall referred to as a principle of "universal law ... that, in every forum, a contract is governed by the law with a view to which it was made." Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 48, 6 L.Ed. 253 (1825). This principle derives from the most basic policy of contract law, which is the protection of the justified expectations of the parties. See E. SCOLES & P. HAY, CONFLICT OF LAWS 632 (1984) ["SCOLES"]; Reese, Choice of Law in Torts and Contracts and Directions for the Future, 16 COLUM.J. TRANSNAT'L L. 1, 21 (1977). The parties' understanding of their respective contractual rights and obligations depends in part upon the certainty with which they may predict how the law will interpret and enforce their agreement. Id.

When parties to a contract reside or expect to perform their respective obligations in multiple jurisdictions, they may be uncertain as to what jurisdiction's law will govern construction and enforcement of the contract. To avoid this uncertainty, they may express in their agreement their own choice that the law of a specified jurisdiction apply to their agreement. Judicial respect for their choice advances

the policy of protecting their expectations. This conflict of laws concept has come to be referred to as party autonomy. See R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 269-271 (1971) ["WEINTRAUB"]. However, the parties' freedom to choose what jurisdiction's law will apply to their agreement cannot be unlimited. They cannot require that their contract be governed by the law of a jurisdiction which has no relation whatever to them or their agreement. And they cannot by agreement thwart or offend the public policy of the state the law of which ought otherwise to apply. So limited, party autonomy furthers the basic policy of contract law. With roots deep in two centuries of American jurisprudence, limited party autonomy has grown to be the modern rule in contracts conflict of laws. See SCOLES, supra at 632- 652; WEINTRAUB, supra at 269-275; RESTATEMENT (SECOND) OF CONFLICT OF LAWS ["THE RESTATEMENT"] s 187 (1971).

The party autonomy rule has been recognized in this state. The Legislature has provided in the Uniform Commercial Code:

> [W]hen a transaction bears a reasonable relation to this state and also to another state or nation the parties may agree that the law either of this state or of such other state or nation shall govern their rights and duties.

TEX.BUS. & COM.CODE ANN. s 1.105(a) (Vernon Supp.1989). In a different context, one court of appeals has elaborated further:

> [A]n express agreement of the parties that the contract is to be governed by the laws of a particular state will be given effect if the contract bears a reasonable relation to the chosen state and no countervailing public policy of the forum

demands otherwise.

First Commerce Realty Investors v. K-F Land Co., 617 S.W.2d 806, 808-809 (Tex.Civ.App.--Houston [14th Dist.] 1981, writ ref'd n.r.e.) (citing, inter alia, the RESTATEMENT s 187). We believe the rule is best formulated in section 187 of the RESTATEMENT and will therefore look to its provisions in our analysis of this case.

B

Section 187 states:

> Law of the State Chosen by the Parties
> (1) The law of the state chosen by the parties to govern their contractual rights and duties will be applied if the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue.
>
> (2) The law of the state chosen by the parties to govern their contractual rights and duties will be applied, even if the particular issue is one which the parties could not have resolved by an explicit provision in their agreement directed to that issue, unless either
>
> (a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice, or
>
> (b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of s 188, would be the state of the applicable law in the absence of an effective choice of law by

the parties.

> (3) In the absence of a contrary indication of intention, the reference is to the local law of the state of the chosen law.

The issue before us--whether the noncompetition agreement in this case is enforceable--is not "one which the parties could have resolved by an explicit provision in their agreement". See RESTATEMENT (SECOND) OF CONFLICT OF LAWS s 187 comment d (1971). We therefore apply section 187(2).

The parties in this case chose the law of Florida to govern their contract. Florida has a substantial relationship to the parties and the transaction because Wackenhut's corporate offices are there, and some of the negotiations between DeSantis and George Wackenhut occurred there. Thus, under section 187(2) Florida law should apply in this case unless it falls within the exception stated in section 187(2)(b). Whether that exception applies depends upon three determinations: first, whether there is a state the law of which would apply under section 188 of the RESTATEMENT absent an effective choice of law by the parties, or in other words, whether a state has a more significant relationship with the parties and their transaction than the state they chose; second, whether that state has a materially greater interest than the chosen state in deciding whether this noncompetition agreement should be enforced; and third, whether that state's fundamental policy would be contravened by the application of the law of the chosen state in this case. More particularly, we must determine: first, whether Texas has a more significant relationship to these parties and their transaction than Florida; second, whether Texas has a materially greater interest than Florida in deciding the enforceability of the noncompetition agreement in this case; and third, whether the application of Florida law in this case would be contrary to fundamental policy of

Texas.

1

Section 188 of the RESTATEMENT provides that a contract is to be governed by the law of the state that "has the most significant relationship to the transaction and the parties", taking into account various contacts in light of the basic conflict of laws principles of section 6 of the RESTATEMENT. [FN2] In this case, that state is Texas. Wackenhut hired DeSantis to manage its business in the Houston area. Although some of the negotiations between DeSantis and Wackenhut occurred in Florida, the noncompetition agreement was finally executed by DeSantis in Houston. [FN3] The place of performance for both parties was Texas, where the subject matter of the contract was located. Wackenhut may also be considered to have performed its obligations in part in Florida, from where it supervised its various operations, including its Houston office. Still, the gist of the agreement in this case was the performance of personal services in Texas. As a rule, that factor alone is conclusive in determining what state's law is to apply. See RESTATEMENT s 196 (1971); [FN4] see also Schulke Radio Prod. Ltd. v. Midwestern Broadcasting Co., 6 Ohio St.3d 436, 453 N.E.2d 683, 685-6 (1983); Wood Bros. Homes, Inc. v. Walker Adjustment Bureau, 198 Colo. 444, 601 P.2d 1369, 1373 (1979); Graham v. Wilkins, 145 Conn. 34, 138 A.2d 705, 708 (1958). In this case, the relationship of the transaction and parties to Texas was clearly more significant than their relationship to Florida.

2

Texas has a materially greater interest than does Florida in determining whether the noncompetition agreement in this case is enforceable. At stake here is whether a Texas resident can leave one Texas job to start a competing Texas business. Thus, Texas is directly interested in DeSantis as an employee in this state, in Wackenhut as a national employer doing business in this

state, in RDI as a new competitive business being formed in the state, and in consumers of the services furnished in Texas by Wackenhut and RDI and performed by DeSantis. Texas also shares with Florida a general interest in protecting the justifiable expectations of entities doing business in several states. Florida's direct interest in the enforcement of the noncompetition agreement in this case is limited to protecting a national business headquartered in that state. Although it is always problematic for one state to balance its own interests fairly against those of another state, the circumstances of this case leave little doubt, if any, that Texas has a materially greater interest than Florida in deciding whether the noncompetition agreement in this case should be enforced.

3

Having concluded that Texas law would control the issue of enforceability of the noncompetition agreement in this case but for the parties' choice of Florida law, and that Texas' interest in deciding this issue in this case is materially greater than Florida's, we must finally determine under section 187(2)(b) of the RESTATEMENT whether application of Florida law to decide this issue would be contrary to fundamental policy of Texas. The RESTATEMENT offers little guidance in making this determination. Comment g states only that a "fundamental" policy is a "substantial" one, and that "[t]he forum will apply its own legal principles in determining whether a given policy is a fundamental one within the meaning of the present rule...."

Comment g to section 187 does suggest that application of the law of another state is not contrary to the fundamental policy of the forum merely because it leads to a different result than would obtain under the forum's law. We agree that the result in one case cannot determine whether the issue is a matter of fundamental state policy for purposes of resolving a conflict of laws.

Moreover, the fact that the law of another state is materially different from the law of this state does not itself establish that application of the other state's law would offend the fundamental policy of Texas. In analyzing whether fundamental policy is offended under section 187(2)(b), the focus is on whether the law in question is a part of state policy so fundamental that the courts of the state will refuse to enforce an agreement contrary to that law, despite the parties' original intentions, and even though the agreement would be enforceable in another state connected with the transaction. [FN5]

Neither the RESTATEMENT nor the cases which have followed section 187 have undertaken a general definition of "fundamental policy", and we need not make the attempt in this case; for whatever its parameters, enforcement of noncompetition agreements falls well within them. This Court has held that "[a]n agreement not to compete is in restraint of trade and will not be enforced unless it is reasonable." Frankiewicz v. National Comp Assoc., 633 S.W.2d 505, 507 (Tex.1982); accord Weatherford Oil Tool Co. v. Campbell, 161 Tex. 310, 340 S.W.2d 950, 951 (1960). As a general rule, unreasonable restraints of trade, including unreasonable covenants not to compete, contravene public policy. See Denny v. Roth, 296 S.W.2d 944, 947 (Tex.Civ.App.--Galveston 1956, writ ref'd); RESTATEMENT (SECOND) OF CONTRACTS ss 186-188 (1981); 14 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS ss 1633-1635 (3d ed. 1972). What noncompetition agreements are reasonable restraints upon employees in this state, therefore, is a matter of public policy. Moreover, that policy is fundamental in that it ensures a uniform rule for enforcement of noncompetition agreements in this state. See RESTATEMENT s 187 comment g (1971) ("a fundamental policy may be embodied in a statute which makes one or more kinds of contracts illegal or which is designed to protect a person against the oppressive use of

superior bargaining power"). Absent such a policy, agreements involving residents of other states would be controlled by the law and policy of those states. An employee of one out-of- state employer might take a competing job and escape enforcement of a covenant not to compete because of the law of another state, while a neighbor suffered enforcement of an identical covenant because of the law of a third state. The resulting disruption of orderly employer-employee relations, as well as competition in the marketplace, would be unacceptable. Employers would be encouraged to attempt to invoke the most favorable state law available to govern their relationship with their employees in Texas or other states.

These same considerations and others have led virtually every court that has addressed the question of whether enforcement of noncompetition agreements is a matter of fundamental or important state policy to answer affirmatively. Not many of these courts have considered the matter specifically in the context of section 187 of the RESTATEMENT, and yet, rather remarkably, many have nevertheless expressed similar conclusions. See Dresser Indus., Inc. v. Sandvick, 732 F.2d 783, 787-788 (10th Cir.1984) ("the tendency of the courts [is] to apply the policy of the forum state when parties are litigating covenants not to compete"); Nordson Corp. v. Plasschaert, 674 F.2d 1371, 1375 (11th Cir.1982); Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Stidham, 658 F.2d 1098, 1100 n. 5 (5th Cir.1981); Davis v. Jointless Fire Brick Co., 300 F. 1, 3-4 (9th Cir.1924); Muma v. Financial Guardian, Inc., 551 F.Supp. 119, 121-123 (E.D. Mich.1982); Walling Chem. Co. v. Hart, 508 F.Supp. 338, 340 (D.Neb.1981); Fort Smith Paper Co. v. Sadler Paper Co., 482 F.Supp. 355, 357 (E.D.Ok.1979); Blalock v. Perfect Subscription Co., 458 F.Supp. 123, 127 (S.D.Ala.1978), aff'd per curiam, 599 F.2d 743 (5th Cir.1979); Associated Spring Corp. v. Roy F. Wilson & Avnet, Inc., 410 F.Supp. 967, 976-978 (D.S.C.1976); Fine

v. Property Damage Appraisers, Inc., 393 F.Supp. 1304, 1310 (E.D.La.1975); Boyer v. Piper, Jaffray & Hopwood, Inc., 391 F.Supp. 471, 473 (D.S.D.1975); Forney Indus., Inc. v. Andre, 246 F.Supp. 333, 334-335 (D.N.D.1965); Nasco, Inc. v. Gimbert, 239 Ga. 675, 238 S.E.2d 368, 369 (1977); Standard Register Co. v. Kerrigan, 238 S.C. 54, 119 S.E.2d 533, 541-542 (1961); Temporarily Yours-Temporary Help Services, Inc. v. Manpower, Inc., 377 So.2d 825, 827 (Fla.Dist.Ct.App.1979); see also Barnes Group, Inc. v. C & C Products, Inc., 716 F.2d 1023, 1031-1032 (4th Cir.1983); Bush v. National School Studios, Inc., 139 Wis.2d 635, 407 N.W.2d 883, 886-888 (1987) (suit for unfair termination).

We likewise conclude that the law governing enforcement of noncompetition agreements is fundamental policy in Texas, and that to apply the law of another state to determine the enforceability of such an agreement in the circumstances of a case like this would be contrary to that policy. We therefore hold that the enforceability of the agreement in this case must be judged by Texas law, not Florida law.

III

We now consider whether the noncompetition agreement between DeSantis and Wackenhut is enforceable under Texas law. We must also consider the effect upon this case of certain legislation passed while this case has been pending before this Court.

A

The fundamental common law principles which govern the enforceability of covenants not to compete in Texas are relatively well established. An agreement not to compete is in restraint of trade and therefore unenforceable on grounds of public policy [FN6] unless it is reasonable. Frankiewicz v. National Comp Assocs., 633 S.W.2d 505, 507 (Tex.1982); Weatherford Oil Tool Co. v. Campbell, 161 Tex. 310, 340 S.W.2d 950, 951 (1960);

RESTATEMENT (SECOND) OF CONTRACTS s 186 (1981). An agreement not to compete is not a reasonable restraint of trade unless it meets each of three criteria. First, the agreement not to compete must be ancillary to an otherwise valid transaction or relationship. Justin Belt Co. v. Yost, 502 S.W.2d 681, 683-684 (Tex.1973); Potomac Fire Ins. Co. v. State, 18 S.W.2d 929, 934-935 (Tex.Civ.App.--Austin 1929, writ ref'd); RESTATEMENT (SECOND) OF CONTRACTS s 187 (1981). Such a restraint on competition is unreasonable unless it is part of and subsidiary to an otherwise valid transaction or relationship which gives rise to an interest worthy of protection. RESTATEMENT (SECOND) OF CONTRACTS s 187 comment b (1981). Such transactions or relationships include the purchase and sale of a business, and employment relationships. Restatement (Second) of Contracts s 188(2) (1981). Second, the restraint created by the agreement not to compete must not be greater than necessary to protect the promisee's legitimate interest. Henshaw v. Kroenecke, 656 S.W.2d 416, 418 (Tex.1983); Weatherford, 340 S.W.2d at 951; RESTATEMENT (SECOND) OF CONTRACTS s 188(1)(a) (1981). Examples of legitimate, protectable interests include business goodwill, trade secrets, and other confidential or proprietary information. Restatement (Second) of Contracts s 188 comments b, g (1981). The extent of the agreement not to compete must accordingly be limited appropriately as to time, territory, and type of activity. RESTATEMENT (SECOND) OF CONTRACTS s 188 comment d (1981); see Frankiewicz, 633 S.W.2d at 507; Justin Belt, 502 S.W.2d at 685; Weatherford, 340 S.W.2d at 951. An agreement not to compete which is not appropriately limited may be modified and enforced by a court of equity to the extent necessary to protect the promisee's legitimate interest, but may not be enforced by a court of law. Weatherford, 340 S.W.2d at 952-953. Third, the promisee's need for the protection afforded by the agreement not to compete must not be outweighed by either the hardship to the

promisor or any injury likely to the public. RESTATEMENT (SECOND) OF CONTRACTS s 188(1)(b) (1981); see Henshaw, 656 S.W.2d at 418 (citing Weatherford, 340 S.W.2d at 951 (agreement may not impose undue hardship on promisor)). Before an agreement not to compete will be enforced, its benefits must be balanced against its burdens, both to the promisor and the public. Thus, such an agreement may, in a particular case, accomplish the salutary purpose of encouraging an employer to share confidential, proprietary information with an employee in furtherance of their common purpose, but must not also take unfair advantage of the disparity of bargaining power between them or too severely impair the employee's personal freedom and economic mobility. See RESTATEMENT (SECOND) OF CONTRACTS s 188 comments c, g (1981). Whether an agreement not to compete is a reasonable restraint of trade is a question of law for the court. Henshaw, 656 S.W.2d at 418.

This Court referred to these principles in Hill v. Mobile Auto Trim, Inc., 725 S.W.2d 168 (Tex.1987). After holding the agreement not to compete in that case unreasonable and unenforceable, the Court added that agreements "which are primarily designed to limit competition or restrain the right to engage in a common calling are not enforceable." 725 S.W.2d at 172. The Court did not define "common calling" or elaborate upon the purpose to be served by this additional requirement. The Court again referred to "common calling" in Bergman v. Norris of Houston, 734 S.W.2d 673 (Tex.1987), but did not further elucidate the phrase except to say that "[w]hether an employee is engaged in a common calling is a question of law to be decided from the facts of each individual case." Id. at 674. Although the Court held the covenants not to compete in Bergman unenforceable because the promisees were engaged in a common calling, it is apparent from the recitation of the evidence that the covenants would have fared no better under the principles

we have set out above.

The references to "common calling" in Hill and Bergman have proven confusing in determining whether to enforce agreements not to compete. Two courts of appeals have attempted to define "common calling". Cukjati v. Burkett, 772 S.W.2d 215, 217 (Tex.App.--Dallas 1989, no writ); B. Cantrell Oil Co. v. Hino Gas Sales, Inc., 756 S.W.2d 781, 783 (Tex.App.--Corpus Christi 1988, no writ); Travel Masters, Inc. v. Star Tours, Inc., 742 S.W.2d 837, 840-841 (Tex.App.--Dallas 1987, writ dism'd w.o.j.). Another court of appeals has attempted to apply the standard without defining it. Hoddeson v. Conroe Ear, Nose & Throat Assocs., 751 S.W.2d 289, 290 (Tex.App.--Beaumont 1988, no writ). Other courts have acknowledged this Court's reference to "common calling" but then reached decisions regarding the enforceability of agreements not to compete in their respective cases without attempting to apply that standard. Posey v. Monier Resources, Inc., 768 S.W.2d 915, 918 (Tex.App.--San Antonio 1989, writ denied); French v. Community Broadcasting of Coastal Bend, Inc., 766 S.W.2d 330, 333 (Tex.App.--Corpus Christi 1989, writ dism'd w.o.j.); Bland v. Henry & Peters, 763 S.W.2d 5, 7-8 (Tex.App.-- Tyler 1988, writ denied); M.R.S. Datascope Inc. v. Exchange Data Corp., 745 S.W.2d 542, 546 (Tex.App.--Houston [1st Dist.] 1988, no writ). One court has held that veterinary medicine is not a common calling. Cukjati, 772 S.W.2d at 217. Another has held, over a vigorous dissent, that a medical doctor certified as an ear, nose and throat specialist is engaged in a common calling. Hoddeson, 751 S.W.2d at 290.

In deciding whether an ancillary agreement not to compete is reasonable, the court should focus on the need to protect a legitimate interest of the promisee and the hardship of such protection on the promisor and the public. The nature of the promisor's job--whether it is a common calling--may sometimes factor into the

determination of reasonableness, but it is not the primary focus of inquiry. The results in Hill and Bergman would have been the same irrespective of whether the promisors in those cases had been engaged in common callings. Moreover, the Legislature has now rejected common calling as a test for the reasonableness of noncompetition agreements. See TEX.BUS. & COM.CODE ANN. ss 15.50-15.51 (Vernon Supp.1990). Accordingly, we do not apply "common calling". We hold instead that the principles set out above are to be applied in determining whether an agreement not to compete is reasonable.

B

There is no dispute in this case that the agreement not to compete was ancillary to an otherwise valid relationship, viz., Wackenhut's employment of DeSantis. The dispute is whether the agreement was necessary to protect some legitimate interest of Wackenhut, and whether that necessity was outweighed by the hardship of enforcement. As we have noted above, these are all questions for the court.

Wackenhut claims that the business goodwill developed for it by DeSantis was an interest protectable by an agreement not to compete. The evidence that DeSantis ever developed business goodwill for Wackenhut, however, is exceedingly slight on this record, little more than testimony that DeSantis occasionally entertained representatives of Wackenhut's clients. Indeed, Wackenhut's contention that DeSantis' unethical business solicitation led it to request his resignation tends, at least, to contradict its contention that DeSantis developed goodwill among its customers. Assuming, however, that DeSantis did develop business goodwill for Wackenhut, there is no showing that he did or even could divert that goodwill to himself for his own benefit after leaving Wackenhut. The jury found that DeSantis competed with Wackenhut after leaving its employ, and the evidence leaves little doubt that he did; but there is no finding and

almost no evidence that DeSantis was able to appropriate for his own use any business goodwill that he developed for Wackenhut. Rather, the evidence is that after announcing his departure to some ten or fifteen of Wackenhut's customers, in the following six months DeSantis received business from only one of those customers and might have received business from another. There is evidence that both were considering moving their business to DeSantis' new company, RDI, because they were dissatisfied with Wackenhut's services. There is no evidence that either customer considered replacing Wackenhut with DeSantis because of the goodwill DeSantis had developed with those customers while at Wackenhut. There is simply no showing on this record that prohibiting DeSantis from competing with Wackenhut after he left its employ was necessary to keep DeSantis from trading on Wackenhut's business goodwill, much less any showing that the hardship of the agreement on DeSantis was outweighed by the need to protect any such interest.

Wackenhut also claims that it possessed confidential information protectable by an agreement not to compete. Specifically, Wackenhut contends that during his employ, DeSantis learned the identity of Wackenhut's customers, their special needs and requirements, and Wackenhut's pricing policies, cost factors and bidding strategies. Again, while confidential information may be protected by an agreement not to compete, Wackenhut has failed to show that it needed such protection in this case. Wackenhut failed to show that its customers could not readily be identified by someone outside its employ, that such knowledge carried some competitive advantage, or that its customers' needs could not be ascertained simply by inquiry addressed to those customers themselves. Also, Wackenhut failed to show that its pricing policies and bidding strategies were uniquely developed, or that information about its prices and bids could not, again, be obtained from the customers themselves. There is no

evidence that DeSantis ever took advantage of any knowledge he had of Wackenhut's cost factors in trying to outbid Wackenhut or woo away its customers. Wackenhut simply has not demonstrated a need to protect any confidential information by limiting DeSantis' right to compete.

Having determined that Wackenhut has not shown that DeSantis' agreement not to compete is necessary to protect any legitimate business interest, or that the necessity of such protection outweighs the hardship of that agreement on DeSantis, we conclude that the agreement is unreasonable and therefore unenforceable.

C

While this case has been pending before this Court, the Legislature has added subchapter E to the Texas Business and Commerce Code and expressly made it applicable "to a covenant entered into before, on, or after the effective date of this Act." Act of June 16, 1989, ch. 1193, s 1, 1989 Tex.Gen.Laws 4852 (effective Aug. 28, 1989). [FN7] Thus, this Act purports to apply to the agreement not to compete before us in this case.

The obvious threshold issue which this recent legislation presents is whether it may affect litigation regarding the rights of parties to an agreement not to compete which commenced before the statute was enacted. We find it unnecessary, however, to resolve this issue in this case because we conclude that the result in this case would not be affected by the statute. Under section 15.50(2), "a covenant not to compete is enforceable to the extent that it ... contains reasonable limitations ... that do not impose a greater restraint than is necessary to protect the goodwill or other business interest of the promisee." Section 15.51(b) obliges the promisee, Wackenhut in this case, to establish a protectable business interest when the matter involves rendition of personal services, as this one does. Because we have held that

Wackenhut has failed to make this required showing, we cannot reform the agreement to meet either the criteria of section 15.50(2), or of Weatherford for that matter. The agreement not to compete in this case is no more enforceable under sections 15.50 and 15.51 of the Texas Business and Commerce Code than it would be under the above-stated common law principles governing such agreements.

Accordingly, we leave for another day the issues of whether this recent legislation affects all covenants not to compete entered into before the effective date of the Act, and how it alters the common law principles governing such covenants.

IV

We now turn to DeSantis and RDI's contentions that they are entitled to recover on their claims against Wackenhut for wrongfully securing temporary injunctive relief, violating state antitrust laws, fraud, and tortiously interfering with contract and business relationships. We consider each of these claims in turn.

A

DeSantis and RDI claim that Wackenhut has prosecuted this action against them maliciously, that it procured the temporary restraining order and temporary injunction against them wrongfully, and that they have suffered damages as a result. DeSantis and RDI each alleged actual damages greatly in excess of the $5,000 temporary restraining order bond and the $75,000 temporary injunction bond which Wackenhut filed.

A person who obtains an injunction wrongfully is liable for damages caused by issuance of the injunction. Parks v. O'Connor, 70 Tex. 377, 8 S.W. 104, 107 (1888). There are two separate causes of action for wrongful injunction, one upon the bond ordinarily filed to obtain the injunction, and the other for malicious prosecution. See Annot.,

Liability Apart from Bond and in Absence of Elements of Malicious Prosecution for Wrongfully Suing Out Injunction, 45 A.L.R. 1517 (1926); Annot., Proceedings for Injunction or Restraining Order as Basis of Malicious Prosecution Action, 70 A.L.R.3d 536 (1976). The two actions differ in the kind of wrong which must be shown to establish liability and in the amount of recovery. The few Texas cases which have addressed these differences have not been entirely clear or consistent.

A cause of action upon an injunction bond is predicated upon a breach of the condition of the bond. That condition, as prescribed by Rule 684, Texas Rules of Civil Procedure, is "that the applicant will abide the decision which may be made in the cause, and that he will pay all sums of money and costs that may be adjudged against him if the restraining order or temporary injunction shall be dissolved in whole or in part." To prevail upon this cause of action, the claimant must prove that the temporary restraining order or temporary injunction was issued or perpetuated when it should not have been, and that it was later dissolved. See Craddock v. Overstreet, 435 S.W.2d 607, 608-609 (Tex.Civ.App.--Tyler 1968, writ ref'd n.r.e.). The claimant need not prove that the temporary restraining order or temporary injunction was obtained maliciously or without probable cause. See Johnson v. McMahan, 40 S.W.2d 920, 922 (Tex.Civ.App.-- Amarillo 1931, writ ref'd). The purpose of the bond is to protect the defendant from the harm he may sustain as a result of temporary relief granted upon the reduced showing required of the injunction plaintiff, pending full consideration of all issues. An injunction plaintiff need not establish the correctness of his claim to obtain temporary relief, but must show only a likelihood of success on the merits. Correspondingly, an injunction defendant has a lesser burden to establish his right to recover on an injunction bond than would be required in an ordinary action for malicious prosecution.

The only other cause of action for wrongful injunction is for malicious prosecution. " 'It is established by the weight of authority that in the absence of elements of an action for malicious prosecution no action will lie by the defendant in an injunction suit, independently of a bond or undertaking, for damages for the wrongful suing out of the injunction.' " Camp v. Atlantic Refining Co., 179 S.W.2d 326, 328 (Tex.Civ.App.-- Texarkana 1944, writ ref'd). To prevail upon this cause of action the claimant must prove that the injunction suit was prosecuted maliciously and without probable cause, and was terminated in his favor. See James v. Brown, 637 S.W.2d 914, 918 (Tex.1982). Once the injunction plaintiff has prevailed after full hearing of all issues, damages to the defendant result not from the reduced showing required to obtain temporary relief but from the full proof necessary to succeed on the merits, and defendant cannot recover those damages without full proof of malicious prosecution.

The damages recoverable in an action on an injunction bond are, of course, limited to the amount of the bond. In an action for malicious prosecution, all actual damages may be recovered. Under either cause of action the claimant must prove that issuance of the injunction caused him damages. He cannot recover for having been prohibited from doing something which he had no right to do. Parks, 8 S.W. at 107. Nor can he recover for having been prohibited from doing something which he agreed not to do, even if the agreement was unenforceable. Wissman v. Boucher, 150 Tex. 326, 240 S.W.2d 278, 281 (1951).

The temporary restraining order and temporary injunction against DeSantis and RDI were never dissolved. Consequently, under Rule 684, Texas Rules of Civil Procedure, DeSantis and RDI are not entitled to recover against the bond Wackenhut posted for each of these orders. DeSantis and RDI did not request jury

findings on their malicious prosecution claim and therefore waived it. Moreover, there is no evidence in this record that Wackenhut acted maliciously and without probable cause in bringing suit, especially inasmuch as the trial court and court of appeals both found merit in Wackenhut's claim. Thus, DeSantis and RDI are not entitled to recover on their claim of malicious prosecution. Accordingly, DeSantis and RDI have failed to establish their right to recover damages against Wackenhut for wrongful injunction.

B

DeSantis and RDI claim that the noncompetition agreement between DeSantis and Wackenhut violates the Texas Free Enterprise and Antitrust Act of 1983, Texas Business and Commerce Code Annotated sections 15.01-15.51 (Vernon 1987 and Supp.1990), and that they are therefore entitled to recover treble damages against Wackenhut under that statute. More specifically, DeSantis and RDI assert that the noncompetition agreement is unlawful under section 15.05(a), which declares that "[e]very contract ... in restraint of trade or commerce is unlawful." DeSantis and RDI contend that, under section 15.21(a), they are entitled to recover damages from Wackenhut as persons "whose business or property has been injured by reason of any conduct declared unlawful" in section 15.05(a), and that because Wackenhut's conduct was "willful or flagrant", they are entitled to have those damages trebled.

Although we have not previously had occasion to apply state antitrust statutes to noncompetition agreements between employers and employees, we do not write on a clean slate. Section 15.04 instructs:

> The purpose of this Act is to maintain and promote economic competition in trade and commerce occurring wholly or partly within the State of Texas and to provide the benefits of that competition to

> consumers in the state. The provisions of this Act shall be construed to accomplish this purpose and shall be construed in harmony with federal judicial interpretations of comparable federal antitrust statutes to the extent consistent with this purpose.

Section 15.05(a) is comparable to, and indeed taken from, section 1 of the Sherman Antitrust Act, 15 U.S.C. s 1 (1988). [FN8] Accordingly, we look to federal judicial interpretations of section 1 of the Sherman Act in applying section 15.05(a) of our state antitrust law.

As we have noted above, an agreement not to compete is a restraint on trade. However, not every contract in restraint of trade is prohibited by section 1 of the Sherman Act, but only those contracts which unreasonably restrain trade. E.g., Standard Oil Co. v. United States, 221 U.S. 1, 60, 31 S.Ct. 502, 515, 55 L.Ed. 619 (1911); United States v. American Tobacco Co., 221 U.S. 106, 179, 31 S.Ct. 632, 648, 55 L.Ed. 663 (1911). The focus of this "rule of reason" test is upon whether the restraint promotes competition or suppresses or destroys competition. Chicago Bd. of Trade v. United States, 246 U.S. 231, 238, 38 S.Ct. 242, 243, 62 L.Ed. 683 (1918); Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 49, 97 S.Ct. 2549, 2557, 53 L.Ed.2d 568 (1977); National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679, 688, 98 S.Ct. 1355, 1363, 55 L.Ed.2d 637 (1978). Some restraints, because of their inherently pernicious effect upon competition, are per se unreasonable, while others are not and must be analyzed under the rule of reason. See 2 J. VON KALINOWSKI, ANTITRUST LAWS AND TRADE REGULATION s 3.02[6] (1989). The factors important to a rule of reason analysis vary from case to case. See Chicago Bd. of Trade, 246 U.S. at 238, 38 S.Ct. at 243; D. ASPELUND & C. ERIKSEN, EMPLOYEE NONCOMPETITION LAW s 7.01 (1987) ["ASPELUND"]; W. LIFLAND, STATE ANTITRUST LAW s 4.02 (1987) ["LIFLAND"]; E. ROCKEFELLER, ANTITRUST QUESTIONS AND

ANSWERS 16-20 (1974).

Until recently, there were few attempts to apply antitrust law to post-employment noncompetition agreements. See ASPELUND, supra s 7.01, at 7-1 to 7-4; Blake, Employee Agreements Not to Compete, 73 HARV.L.REV. 625, 628 n. 8 (1960) ["Blake"]; White, "Common Callings" and the Enforcement of Postemployment Covenants in Texas, 19 ST. MARY'S L.J. 589, 599 (1988); Note, The Antitrust Implications of Employee Noncompete Agreements: A Labor Market Analysis, 66 MINN.L.REV. 519, 520 (1982) ["Note"]. There can be little doubt that the Sherman Act applies to such agreements. See Consultants & Designers, Inc. v. Butler Serv. Group, Inc., 720 F.2d 1553, 1564 (11th Cir.1983); Aydin Corp. v. Loral Corp., 718 F.2d 897, 901-903 (9th Cir.1983); Newburger, Loeb & Co. v. Gross, 563 F.2d 1057, 1082 (2d Cir.1977), cert. denied, 434 U.S. 1035, 98 S.Ct. 769, 54 L.Ed.2d 782 (1978); Golden v. Kentile Floors, Inc., 512 F.2d 838, 843- 844 (5th Cir.1975); Bradford v. New York Times Co., 501 F.2d 51, 59 (2nd Cir.1974); ASPELUND, supra s 7.01 at 7-8; A. VALIULUS, COVENANTS NOT TO COMPETE: FORMS, TACTICS, AND THE LAW 37 (1985) ["VALIULUS"]. However, it appears that no such noncompetition agreement has ever been held to violate the Sherman Act. See United States v. Empire Gas Corp., 537 F.2d 296, 301 (8th Cir.1976), cert. denied, 429 U.S. 1122, 97 S.Ct. 1158, 51 L.Ed.2d 572 (1977); Bradford, 501 F.2d at 59 (2nd Cir.1974); Golden, 512 F.2d at 843-844 (5th Cir.1975); Frackowiak v. Farmers Ins. Co., 411 F.Supp. 1309, 1315-1316 (D.Kan.1976); ASPELUND, supra s 7.01 at 7-4; Blake, supra 628 and n. 8. One explanation for this absence of precedent may be the difficulty involved in proving that a post-employment noncompetition agreement violates the Sherman Act. Such agreements are not per se violations of the Sherman Act but must be analyzed under the rule of reason. See Consultants, 720 F.2d at 1560-1562; Aydin, 718 F.2d at

900-901; Golden, 512 F.2d at 843-844; Bradford, 501 F.2d at 59-60; ASPELUND, supra s 7.01 at 7-11 to 7-12; cf. Newburger, 563 F.2d at 1082 (not ordinarily a per se violation, but might be if served no legitimate purpose when adopted). To establish a violation under the rule of reason, one must prove that the agreement has an adverse effect on competition in the relevant market. See Consultants, 720 F.2d at 1562; Aydin, 718 F.2d at 902. This is distinguished from the effect a post-employment noncompetition agreement has on the particular employer and employee involved. See Bradford, 501 F.2d at 59-60; ASPELUND, supra s 7.01 at 7-14 to 7-15; Note, supra at 524-525 n. 10.

Rule of reason analysis under antitrust laws must not be confused with reasonableness analysis under the common law. Rule of reason analysis tests the effect of a restraint of trade on competition. By contrast, whether a noncompetition agreement is reasonable depends upon its effect on the parties, the competitors, as it were. The two standards are not directly related. An agreement may be reasonable as between the parties and nevertheless violate antitrust laws. See Vendo Co. v. Lektro-Vend Corp., 433 U.S. 623, 97 S.Ct. 2881, 53 L.Ed.2d 1009 (1977) (Stevens, J., dissenting). Conversely, an agreement may be unreasonable as between the parties and yet not violate the rule of reason test under the antitrust laws.

Construing section 15.05(a) of our state antitrust law in light of these federal judicial interpretations of section 1 the Sherman Act, as we are instructed to do by statute, we hold that a post-employment noncompetition agreement does not violate section 15.05(a) unless it fails the same rule of reason analysis that would be applied under federal law. [FN9] The anticompetitive market effect necessary to show such a violation does not appear in this case. DeSantis and RDI offered no evidence of relevant market or anticompetitive effect, and requested no fact findings by the jury on these issues. Accordingly, DeSantis

and RDI have failed to establish their right to recover for violations of state antitrust law.

C

DeSantis and RDI claim that Wackenhut fraudulently induced DeSantis to sign the noncompetition agreement. More specifically, DeSantis claims that he signed the agreement only because George Wackenhut misrepresented to him that he was being considered for an executive position. The trial court granted a directed verdict for Wackenhut on DeSantis and RDI's fraud claims, which was proper if there was no evidence to support at least one element of the cause of action. The elements of fraud are a material misrepresentation, which was false, and which was either known to be false when made or was asserted without knowledge of the truth, which was intended to be acted upon, which was relied upon, and which caused injury. Stone v. Lawyers Title Ins. Corp., 554 S.W.2d 183, 185 (Tex.1977). The only evidence of fraud at trial consisted of DeSantis' testimony that George Wackenhut told him that he wanted to surround his son with professionals to move the company into the future, that he had been told that DeSantis was one of those professionals, that DeSantis would be required to learn the "bread and butter" of the business and then would move to the next stage, and that DeSantis was basically being hired for an executive position. Assuming that George Wackenhut made the statements which DeSantis attributed to him, even though he denied DeSantis' account of their conversation, DeSantis produced no evidence that these statements were false when they were made, or that George Wackenhut knew that they were false when he made them, or that he intended by these statements to induce DeSantis to sign the noncompetition agreement. Inasmuch as DeSantis and RDI failed to produce evidence to support each element of their fraud claim, the court of appeals correctly affirmed the trial court's grant of a directed verdict on that claim.

D

DeSantis and RDI claim that Wackenhut's enforcement of the noncompetition agreement tortiously interfered with their contract and business relationships. Wackenhut moved for summary judgment on this claim, based upon an affidavit which was not included in the record on appeal. The trial court granted Wackenhut's motion. To appeal this ruling, DeSantis and RDI had the burden to bring forward the record of the summary judgment hearing to prove harmful error. Escontrias v. Apodaca, 629 S.W.2d 697, 699 (Tex.1982). Absent a complete record of the summary judgment evidence, an appellate court must assume that the omitted documents support the judgment of the trial court. Alexander v. Bank of Am. Nat'l Trust & Sav. Ass'n, 401 S.W.2d 688, 689 (Tex.Civ.App.--Waco 1966, writ ref'd); Hassell v. New England Mut. Life Ins. Co., 506 S.W.2d 727 (Tex.Civ.App.--Waco 1974, writ ref'd). Without the affidavit, we are unable to review whether Wackenhut conclusively proved that it was entitled to judgment on the tortious interference claim as a matter of law. The court of appeals, therefore, correctly affirmed the trial court's award of summary judgment for Wackenhut on the tortious interference claim.

V

Inasmuch as we have held the noncompetition agreement in this case to be unreasonable and unenforceable, we reverse the judgment of the court of appeals which affirmed the permanent injunction enforcing that agreement, and vacate that injunction ordered by the trial court. We also reverse the judgment of the court of appeals which affirmed the trial court's judgment awarding Wackenhut attorney fees against DeSantis and RDI. Because we have held that DeSantis and RDI failed to establish their right to recover any damages against Wackenhut, we affirm the judgment of the court of appeals which affirmed the trial court's

judgment that DeSantis and RDI take nothing against Wackenhut. Costs in the trial court, the court of appeals, and this Court are taxed against the party which incurred them.

/s/ NATHAN L. HECHT, Justice

Concurring opinion by Justice Mauzy, joined by Justice Spears

OPINION DELIVERED: June 6, 1990

FN1. Whether a party has been or will be irreparably harmed is not a jury issue, although factual issues to be considered by the court in making that determination may be. See, State v. Texas Pet Foods, Inc., 591 S.W.2d 800, 803-804 (Tex.1979).

FN2. Section 188 of the RESTATEMENT states in full: Law Governing in Absence of Effective Choice by the Parties

(1) The rights and duties of the parties with respect to an issue in contract are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the transaction and the parties under the principles stated in s 6.

(2) In the absence of an effective choice of law by the parties (see s 187), the contacts to be taken into account in applying the principles of s 6 to determine the law applicable to an issue include:

(a) the place of contracting,
(b) the place of negotiation of the contract,
(c) the place of performance,

(d) the location of the subject matter of the contract, and

(e) the domicil, residence, nationality, place of incorporation and place of business of the parties.

These contacts are to be evaluated according to their relative importance with respect to the particular issue.

(3) If the place of negotiating the contract and the place of performance are in the same state, the local law of this state will usually be applied, except as otherwise provided in ss 189- 199 and 203.

Section 6 of the RESTATEMENT states:

Choice-of-Law Principles

(1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.

(2) When there is no such directive, the factors relevant to the choice of the applicable rule of law include

(a) the needs of the interstate and international systems,

(b) the relevant policies of the forum,

(c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,

(d) the protection of justified expectations,

(e) the basic policies underlying the particular field of law,

(f) certainty, predictability and uniformity of result, and

(g) ease in the determination and application of the law to be applied.

FN3. The covenant itself states that it was executed in Florida, but testimony for both parties established that DeSantis signed it last in Houston.

FN4. Section 196 states:

Contracts for the Rendition of Services

The validity of a contract for the rendition of services and the rights created thereby are determined, in the absence of an effective choice of law by the parties, by the local law of the state where the contract requires that the services, or a major portion of the services, be rendered, unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in s 6 to the transaction and the parties, in which event the local law of the other state will be applied.

FN5. The trial court apparently concluded that this noncompetition agreement is enforceable under both Texas and Florida law. The court of appeals concluded that the agreement is enforceable under Florida law and did not consider whether it is enforceable under Texas law. DeSantis appears to concede that the agreement is enforceable under Florida law. Wackenhut strongly argues that the agreement is enforceable under Texas law.

FN6. An agreement not to compete may be unenforceable for reasons other than public policy. For example, an agreement not to compete, like any other contract, must be supported by consideration. See B. Cantrell Oil Co. v. Hino Gas Sales, 756 S.W.2d 781, 783 (Tex.--Corpus Christi 1988, no writ); Travel Masters Inc. v. Star Tours,

Inc., 742 S.W.2d 837, 841 (Tex.App.-- Dallas 1987, writ dism'd w.o.j.); Chenault v. Otis Eng'g Corp., 423 S.W.2d 377, 382 (Tex.Civ.App.--Corpus Christi 1967, writ ref'd n.r.e.). Consideration may include special training or knowledge afforded the promisor, but it is not limited to such things, and we specifically disapprove language to the contrary in Bland v. Henry & Peters, 763 S.W.2d 5 (Tex.App.--Tyler 1988, writ denied). Also, performance of a covenant not to compete, like performance of other contractual obligations, may, in certain instances at least, be excused by the promisee's own breach. See Langdon v. Progress Laundry & Cleaning Co., 105 S.W.2d 346, 347-348 (Tex.Civ.App.--Dallas 1937, writ ref'd); Halbert v. Standley, 488 S.W.2d 887, 889 (Tex.Civ.App.--Waco 1972, writ ref'd n.r.e.); RESTATEMENT (SECOND) OF CONTRACTS ss 237-249 (1981). And enforcement of an agreement not to compete may not be by injunction if the party seeking enforcement is not entitled to such equitable relief, as, for example, when that party has himself engaged in inequitable conduct, see Vaughan v. Kizer, 400 S.W.2d 586, 589-590 (Tex.Civ.App.--Waco 1966, writ ref'd n.r.e.); National Chemsearch Corp. v. Frazier, 488 S.W.2d 545, 548 (Tex.Civ.App.--Waco 1972, no writ); or when that party has failed to show that without injunctive relief he will suffer irreparable injury for which he has no adequate legal remedy, see Parkem Indus. Services, Inc., v. Garton, 619 S.W.2d 428, 430-431 (Tex.Civ.App.--Amarillo 1981, no writ).

FN7. New subchapter E added by this Act provides:

SUBCHAPTER E. COVENANTS NOT TO COMPETE Sec. 15.50. CRITERIA FOR

ENFORCEABILITY OF COVENANTS NOT TO COMPETE.

Notwithstanding Section 15.05 of this code, a covenant not to compete is enforceable to the extent that it:

(1) is ancillary to an otherwise enforceable agreement but, if the covenant not to compete is executed on a date other than the date on which the underlying agreement is executed, such covenant must be supported by independent valuable consideration; and

(2) contains reasonable limitations as to time, geographical area, and scope of activity to be restrained that do not impose a greater restraint than is necessary to protect the goodwill or other business interest of the promisee.

Sec. 15.51. PROCEDURES AND REMEDIES IN ACTIONS TO ENFORCE COVENANTS NOT TO COMPETE.

(a) Except as provided in Subsection (c) of this section, a court may award the promisee under a covenant not to compete damages, injunctive relief, or both damages and injunctive relief for a breach by the promisor of the covenant.

(b) If the primary purpose of the agreement to which the covenant is ancillary is to obligate the promisor to render personal services, the promisee has the burden of establishing that the covenant meets the criteria specified by Subdivision (2) of Section 15.50 of this code. If the agreement has a different primary purpose, the promisor has the burden of establishing that the covenant does not meet those criteria. For the purposes of this

subsection, the "burden of establishing" a fact means the burden of persuading the triers of fact that the existence of the fact is more probable than its nonexistence.

(c) If the covenant meets the criteria specified by Subdivision (1) of Section 15.50 of this code but does not meet the criteria specified by Subdivision (2) of Section 15.50, the court, at the request of the promisee, shall reform the covenant to the extent necessary to cause the covenant to meet the criteria specified by Subdivision (2) of Section 15.50 and enforce the covenant as reformed, except that the court may not award the promisee damages for a breach of the covenant before its reformation and the relief granted to the promisee shall be limited to injunctive relief. If the primary purpose of the agreement to which the covenant is ancillary is to obligate the promisor to render personal services, the promisor establishes that the promisee knew at the time of the execution of the agreement that the covenant did not meet the criteria specified by Subdivision (2) of Section 15.50 and the promisee sought to enforce the covenant to a greater extent than was necessary to protect the goodwill or other business interest of the promisee, the court may award the promisor the costs, including reasonable attorney's fees, actually and reasonably incurred by the promisor in defending the action to enforce the covenant.

FN8. "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal...."

FN9. In view of this holding, we are not required in this case to consider the effect of the recent additions of sections 15.50 and 15.51 to the Texas

Business and Commerce Code, see note 8, supra, and we do not do so.

IN THE SUPREME COURT OF TEXAS

NO. C-6617

Edward DeSANTIS, et al.,
Petitioners,

FROM HARRIS COUNTY

v.

FOURTEENTH DISTRICT

WACKENHUT CORPORATION,
Respondent.

CONCURRING OPINION
ON MOTION FOR REHEARING

The Court takes pains to avoid overruling Hill v. Mobile Auto Trim, Inc., 725 S.W.2d 168 (Tex.1987), and Bergman v. Norris of Houston, 734 S.W.2d 673 (Tex.1987) and I am therefore able to concur in the Court's judgment. However, by even discussing these cases, the Court reaches too far.

In Hill and Bergman, "[w]e specifically rejected from being enforceable covenants restricting the right to engage in a common calling." Bergman, 734 S.W.2d at 674. In the instant case, however, the noncompetition agreement is unenforceable without regard to whether it restricts the right to engage in a common calling. Thus, the Court's discussion of the common calling doctrine is unnecessary, gratuitous and ill-advised. Is this not the very definition of "judicial activism"?

I disagree, too, with the Court's conclusion that "the Legislature has now rejected common calling as a test for the reasonableness of noncompetition agreements." --- S.W.2d at ---. The statute in question, Tex.Bus. &

Com.Code s 15.50, effective in 1989, provides in part that "a covenant not to compete is enforceable to the extent that it ... contains reasonable limitations as to time, geographical area, and scope of activity to be restrained." The "scope of activity" language, in my view, leaves adequate room for the continued vitality of the common calling doctrine. In any case, this is not a question the Court needs to decide today.

Finally, I must make two comments regarding the Court's complaint that we have not previously provided a comprehensive definition of "common calling". First, reasonably precise definitions have been formulated. See e.g., C.L. Ray & M. McKelvey, Drafting Enforceable Noncompetition Agreements in Texas, 20 Tex.Tech L.Rev. 63, 68 (1989); W. White, Common Callings and the Enforcement of Postemployment Covenants in Texas, 19 St. Mary's L.J. 589, 611 (1988). Second, it is the genius of the common law that it evolves slowly in the light of reason and experience. I am content to allow the common calling concept to be worked out on a case-by-case basis.

/s/ Oscar H. Mauzy, Justice

Justice Spears joins in this concurring opinion.

OPINION DELIVERED: June 6, 1990

The Supreme Court of Texas June 6, 1990 Judgment:

THE SUPREME COURT OF TEXAS

No. C-6617

EDWARD DESANTIS ET AL.,

Petitioners

vs.

WACKENHUT CORPORATION

Respondent

From HARRIS County,

FOURTEENTH District

JUDGMENT

Motion for rehearing on behalf of Edward DeSantis et al, filed July 28, 1988, and motion for rehearing on behalf of Wackenhut Corporation filed August 12, 1988, having been duly considered, it is ordered that both motions for rehearing be, and hereby are, granted in part and overruled in part. The opinion and judgment of the Court delivered July 13, 1988, are withdrawn and the following judgment is substituted therefor:

THE SUPREME COURT OF TEXAS, having heard this cause on writ of error to the Court of Appeals for the Fourteenth District, and having considered the appellate record and the argument of counsel, is of the opinion that the judgment of the court of appeals should be affirmed in part and reversed in part.

IT IS THEREFORE ORDERED, in accordance with the Court's opinion, that:

1) That part of the judgment of the court of appeals which affirmed the permanent injunction issued by the trial court is reversed, and that injunction is vacated;

2) That part of the judgment of the court of appeals which affirmed the trial court's judgment awarding respondent attorney fees against petitioners is reversed;

3) That part of the judgment of the court of appeals which affirmed the trial court's judgment that petitioners take nothing against respondent is affirmed;

4) Costs in the trial court, the court of appeals, and this Court are taxed against the party which incurred them.

A copy of this judgment and of the Court's opinion is certified to the court of appeals and to the District Court of Harris County, Texas, for observance.

(Opinion of the Court delivered by Justice Hecht)
(Concurring Opinion by Justice Mauzy
joined by Justice Spears)

June 6, 1990

Notice of Extension of Time to file Motion For Rehearing:

SUPREME COURT OF TEXAS
P. O. Box 12248
Supreme Court Building
Austin, Texas 78711
John T. Adams, Clerk

June 19, 1990

Mr. Jon Mercer
3115 West Loop South
Suite 22
Houston TX 77027

Mr. William H. Bruckner
Bruckner & Sykes
2700 Post Oak Boulevard
Suite 2100
Houston TX 77056

Ms. Judith Batson Sadler
Bruckner & Sykes
2700 Post Oak Blvd., Ste. 2100
Houston TX 77056

Re: Case No. C-6617

STYLE: EDWARD DESANTIS ET AL
v. WACKENHUT CORPORATION

Dear Counsel:

Today, the Supreme Court of Texas granted the motion for extension of time to file motion for rehearing of the application for writ of error in the above referenced case.

The motion for rehearing is due to be filed on or before the 6th of August, 1990.

Respectfully yours,

John T. Adams, Clerk

/s/_____
Michael C. Murphey, Deputy

Notice Of Filing of Motion For Rehearing:

OFFICIAL NOTICE FROM
SUPREME COURT OF TEXAS

RE: Case No. C-6617
STYLE: EDWARD DESANTIS ET AL.
v. WACKENHUT CORPORATION

August 3, 1990

Petitioner's motion for rehearing of the above referenced cause was filed this date.

John T. Adams, Clerk

Supreme Court of Texas
P. O. Box 12248
Austin, Texas 78711

Mail to: Mr. Jon Mercer
3115 West Loop South
Suite 22
Houston, TX 77027

Petitioners' Point of Error on Motion For Rehearing to The Supreme Court of Texas:

Point Of Error No. 1

> Having found that the DeSantis noncompetition contract was not necessary to protect any legitimate business interest of Wackenhut and was an unreasonable restraint of trade, the Supreme Court of Texas erred in concluding that an Antitrust violation was not established. This is error because the contract, being without pro-competitive virtue, constitutes a restraint of trade which fails either a per se or a Rule of Reason analysis and violates the Antitrust Law.

Notice of Overruling of Motion For Rehearing:

THE SUPREME COURT OF TEXAS
P. O. Box 12248
Supreme Court Building
Austin, Texas 78711
John T. Adams, Clerk

September 12, 1990

Mr. Jon Mercer
3115 West Loop South
Suite 22
Houston TX 77027

Ms. Judith Batson Sadler
Bruckner & Sykes
2700 Post Oak Blvd, Ste. 2100
Houston, TX 77056

Ms. Sylvia Davidow
Bruckner & Sykes
2700 Post Oak Blvd, Ste. 2100
Houston, TX 77056

Mr. William H. Bruckner
Bruckner & Sykes
2700 Post Oak Boulevard
Suite 2100
Houston, TX 77056

RE: Case No. C-6617

Style: EDWARD DESANTIS ET AL.
v. WACKENHUT CORPORATION

Dear Counsel:

Today, the Supreme Court of Texas overruled the

motion for rehearing in the above referenced cause.

Respectfully yours,

JOHN T. ADAMS, CLERK

/s/_____
Peggy Littlefield,
Chief Deputy Clerk

(2)

No. 90-780

In The

Supreme Court of the United States

October Term, 1990

EDWARD DeSANTIS and RISK DETERRENCE, INC.,

Petitioners,

v.

WACKENHUT CORPORATION,

Respondent.

Petition For Writ Of Certiorari To The Supreme Court Of Texas

BRIEF IN OPPOSITION FOR RESPONDENT

WILLIAM H. BRUCKNER
2700 Post Oak Blvd., Suite 2100
Houston, Texas 77056
Telephone: (713) 877-8788
Telecopier: (713) 877-8065

Counsel of Record

SYLVIA DAVIDOW
2700 Post Oak Blvd., Suite 2100
Houston, Texas 77056
Telephone: (713) 877-8788
Telecopier: (713) 877-8065

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

STATEMENT OF PARENT COMPANIES AND SUBSIDIARIES

Pursuant to Rule 29.1, Respondent Wackenhut Corporation states that there are no parent companies or subsidiaries aside from wholly-owned subsidiaries.

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CASES

TABLE OF AUTHORITIES – Continued

SUMMARY OF ARGUMENT

The decision of the Supreme Court of Texas was proper and legally indistinguishable from other decisions. It is in accordance with overwhelming authority holding that noncompetition covenants do not violate the Sherman Act, 15 U.S.C. § 1, either per se or under a rule of reason analysis. The Texas Supreme Court's decision does not conflict with the decision of any other state court of last resort or of any United States court of appeals. There are no special and important reasons justifying the grant of a writ of certiorari in this case.

ARGUMENT

The Sherman Antitrust Act

Section 1 of the Sherman Antitrust Act, 15 U.S.C. §§ 1, *et seq.*, provides that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . . " Since noncompetition agreements are considered restraints of trade, they are proper subjects for scrutiny under the Sherman Act. *Newburger, Loeb & Co., Inc. v. Gross*, 563 F.2d 1057 (2d Cir. 1977), *cert. denied*, 434 U.S. 1035, 98 S.Ct. 769 (1978).

Read literally, the terms of § 1 would prohibit all private contractual arrangements. *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679, 688-89, 98 S.Ct. 1355, 1363 (1978). However, under elementary principles

of antitrust law § 1 is understood to prohibit only unreasonable restraints of trade. *Board of Trade of City of Chicago v. United States*, 246 U.S. 231, 238, 38 S.Ct. 242, 244 (1918).

Petitioners' Argument

Petitioners seek writ of certiorari under an argument that noncompetition agreements should be found violations per se of § 1 of the Sherman Act, or alternatively under a rule of reason analysis. If the violations are not per se, Petitioners further argue that noncompetition covenants should be found unreasonable without any proof of adverse effect on competition in the relevant market. Rather, they assert, a showing of detrimental effect on the parties to the agreement should be sufficient.

They claim as legally distinguishable from this case all authority concerning agreements held reasonable and enforceable under common law and valid under antitrust law. Unlike those cases, the Texas court found the agreement in the present case unreasonable under common law but reasonable under antitrust law. Petitioners therefore set forth the distinction as a question of law worthy of review.

Per Se Violations and Rule of Reason Analysis

Examination of alleged antitrust violations is two-pronged. Whether a given restraint is to be classified as a per se violation is the first consideration. Only those activities and contractual restraints deemed inherently pernicious, anticompetitive, and entirely lacking in

redeeming virtue are presumptively illegal and unreasonable per se. Courts thus invoke the per se rule when "the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output." *Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc.*, 441 U.S. 1, 8-9, 19-20, 99 S.Ct. 1551, 1556, 1562 (1979).

Per se violations are stringently limited to such anticompetitive practices as tying arrangements, horizontal price fixing, group boycotts, and horizontal market division agreements, all of which have a significant adverse trade impact. *See, e.g., National Collegiate Athletic Ass'n v. Board of Regents of Univ. of Okla.*, 468 U.S. 85, 104 S.Ct. 2948 (1984); *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 97 S.Ct. 2549 (1977); *Consultants & Designers, Inc. v. Butler Serv. Group, Inc.*, 720 F.2d 1553 (11th Cir. 1983); *United States v. Realty Multi-List, Inc.*, 629 F.2d 1351 (5th Cir. 1980); *Bradford v. New York Times Co.*, 501 F.2d 51 (2d Cir. 1974).

Accordingly, from the seminal case of *United States v. Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898), *aff'd as modified*, 175 U.S. 211, 20 S.Ct. 96 (1899), to the present, no court has ever held a noncompetition covenant to violate per se any federal or state antitrust act. The law is established: noncompetition agreements are not per se violations. The Texas court's decision merely followed overwhelming precedent in so holding.

If an agreement is to be a violation of antitrust law, a "rule of reason" analysis, the second consideration in

antitrust inquiry, must be utilized. Antitrust reasonableness turns on an examination of the totality of the circumstances, demanding a case-by-case determination. *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. at 689-90, 98 S.Ct. at 1363-64. The trier of fact must determine whether, under all the circumstances of the case, the restrictive practice imposes an unreasonable restraint on competition. *Business Elec. Corp. v. Sharp Elec. Corp.*, 485 U.S. 717, 108 S.Ct. 1515, 1519 (1988); *Arizona v. Maricopa County Medical Soc'y*, 457 U.S. 332, 343-44, 102 S.Ct. 2466, 2472 (1982). Antitrust unreasonableness therefore focuses on the agreement's adverse impact on competitive conditions in the relevant market. *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. at 688-92, 98 S.Ct. at 1363-65; *Lektro-Vend Corp. v. Vendo Co.*, 660 F.2d 255, 268 (7th Cir. 1981), *cert. denied*, 455 U.S. 921, 102 S.Ct. 1277 (1982).

Separate Analyses: Common Law and Antitrust

Under Petitioners' thesis, common law reasonableness must translate into antitrust reasonableness because most case law finds covenants reasonable under both the common law and the Sherman Act. They claim the converse should be true: common law unreasonableness, as the Texas court found in this case, must lead to antitrust unreasonableness, either per se or under the rule of reason. They seek review on the issue.

Common law reasonableness and antitrust reasonableness may be related due to the rule of reason's

common law origins. However, the analyses are not identical, but involve two separate and distinct determinations. *See National Soc'y of Professional Eng'rs v. United States*, 435 U.S. at 689, 98 S.Ct. at 1363. Common law focuses upon reasonableness as to the parties to the noncompetition agreement. The rule of reason looks not to the interests of the parties but to the interests of the public at large, by focusing on significant adverse market effect of the agreement. *Aydin Corp. v. Loral Corp.*, 718 F.2d 897, 901-02 (9th Cir. 1983).

Relevant Market Analysis

Conceding in their Petition for Writ of Certiorari that noncompetition agreements may not violate per se § 1 of the Sherman Act, Petitioners would have the Court grant certiorari to determine whether the rule of reason requires proof of a relevant market analysis in addition to proof of "actual detrimental effect" on the parties. Again, Petitioners do not present a question of law on this issue justifying certiorari. The rule of reason demands relevant market analysis to establish more than a small impact on commerce by any individual agreement. *See Newburger, Loeb & Co., Inc. v. Gross*, 563 F.2d at 1082.

The weight of overwhelming authority requires some type of market analysis, since identifying the relevant market and isolating the effect of a challenged restraint on that market are dominant considerations in determining whether a restraint is reasonable. *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. at 688-92, 98 S.Ct. at 1363-65; *Lektro-Vend Corp. v. Vendo Co.*, 500 F. Supp. 332, 352 (N.D. Ill. 1980), *aff'd*, 660 F.2d 255 (7th Cir.

1981), *cert. denied*, 455 U.S. 921, 102 S.Ct. 1277 (1982). Without market analysis a covenant's competitive impact cannot be assessed. *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 326-28, 81 S.Ct. 623, 627-28 (1961); *Newburger, Loeb & Co., Inc. v. Gross*, 563 F.2d at 1082-83; *Lektro-Vend Corp. v. Vendo Co.*, 500 F. Supp. at 349-52.

The Texas Supreme Court held that Petitioners did not meet their burden of establishing significant anticompetitive market effect sufficient to prove a violation of antitrust law. Petitioners offered no evidence of an adverse effect on the relevant security services market and requested no jury findings on the issue. (Petitioners' App. 26). The Texas court's decision, in accord with all precedent, presents no question for review.

No Legal Distinction

Finally, Petitioners distinguish all authority from the present case, in which the Texas court found the covenant both unreasonable under common law and reasonable under antitrust law. They conclude that a finding of antitrust reasonableness is somehow contingent upon a finding of common law reasonableness. Since the covenant in the present case was found unreasonable and unenforceable, they request review to determine whether such covenants are also unreasonable under antitrust law. Once again this issue introduces no unsettled question of federal law.

Cases dealing with noncompetition agreements fall generally into the following four categories:

(1) The first and most common group includes cases finding both reasonableness under common law (or state statute) and reasonableness under antitrust law. The majority of cases, including those upon which Petitioners rely, are included in this category.

(2) A second classification deals with those cases in which an agreement is found partially unenforceable under the common law and reasonable under antitrust law. In such cases, courts typically sever the unenforceable portion of the agreement and/or reform the agreement. *See, e.g., Baker's Aid, a Division of M. Raubvogel Co., Inc. v. Hussmann Foodservice Co., et al.*, 730 F. Supp. 1209 (E.D. N.Y. 1990) (geographically overbroad provision of noncompetition agreement severed; remainder of agreement enforced as reasonable under common law and antitrust law).

(3) Other covenants fall within yet a third category. Here, courts hold the agreement at issue unreasonable and unenforceable under common law yet reasonable under antitrust law. No court dealing with such cases finds any significance in the combination of common law unreasonableness and antitrust reasonableness.

The present case is included within the third category, as are a number of other cases. For example, *Amex Distrib. Co., Inc. v. Mascari*, 150 Ariz. 510, 724 P.2d 596 (Ariz. App. 1986) is directly on point. In *Amex Distributing*, the appellate court affirmed the judgment of the lower court, which had held that a temporally overbroad noncompetition covenant was unenforceable but did not violate the Sherman Act. In so doing, the appellate court noted only the distinction between common law and

antitrust analyses. *Id.*, 724 P.2d at 600-01. Validity under the Sherman Act did not merit discussion.

In another opinion, the Fifth Circuit Court of Appeals held a Louisiana noncompete covenant unenforceable because of its lack of territorial limitation. The court also held the same covenant reasonable under § 1 of the Sherman Act, since the evidence presented of relevant adverse market impact was insufficient to show either an illegal restraint of trade or a monopoly. *Taquino v. Teledyne Monarch Rubber*, 893 F.2d 1488 (5th Cir. 1990). Once more, the Fifth Circuit attached no weight to the combination of unenforceability under Louisiana law and validity under the Sherman Act.

In a case upon which Petitioners rely, the district court had originally held a post-employment covenant unenforceable and at the same time valid under antitrust law. The Eleventh Circuit reversed only the lower court's judgment holding the covenant unenforceable, but affirmed the judgment of no antitrust violation. Again, the appellate court's opinion merely limited its discussion to the reasonableness test set forth in the Restatement (Second) of Contracts § 188. The court made no mention of the combination of unenforceability under Alabama law and reasonableness under antitrust law. *See Consultants & Designers, Inc. v. Butler Serv. Group, Inc.*, 720 F.2d at 1559-61.

> (4) Finally, a certain few covenants fall into a fourth category. Those cases deal with noncompetition agreements, which, although individually reasonable and enforceable under common law, are invalid under antitrust law. In those unusual cases, covenants not to compete have been used as parts of schemes to unlawfully

restrain trade. *See, e.g., Schine Chain Theaters, Inc. v. United States*, 334 U.S. 110, 68 S.Ct. 947 (1948) (use of monopoly power through execution by corporate theater owner of unlawful series of master agreements between film distributors and chain theater exhibitors); *United States v. Crescent Amusement Co.*, 323 U.S. 173, 65 S.Ct. 254 (1944) (elimination of competition by combination of film exhibitors, through buying businesses and including noncompete agreements as terms of sale); *United States v. American Tobacco Co.*, 221 U.S. 106, 31 S.Ct. 632 (1911) (unlawful series of agreements not to engage as competitors in the tobacco business between corporations and individuals).

Petitioners do not present an unsettled question of federal law upon which review should be granted. Whether a given noncompetition agreement is unreasonable under common law and reasonable under antitrust law is legally irrelevant and indistinguishable from cases finding covenants reasonable under common law and antitrust law.

CONCLUSION

This case involves a contractual dispute between Respondent and Petitioners that should not be elevated without legal authority into an antitrust violation. The law in the area is established and uniform. Petitioners have therefore failed to sustain their Rule 10 burden of establishing special and important reasons justifying the grant of writ of certiorari.

Respectfully submitted,

WILLIAM H. BRUCKNER
Counsel of Record
SYLVIA DAVIDOW
BRUCKNER & SYKES
2700 Post Oak Blvd., Suite 2100
Houston, Texas 77056
Telephone: (713) 877-8788
Telecopier: (713) 877-8065

Attorneys for Respondent
Wackenhut Corporation